IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-510

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF NEW MEXICO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMICUS CURIAE BRIEF ON BEHALF OF MOLYCORP, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

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With the consent of the parties,[1] and in accordance with the provisions of Rule 42(2) of the Rules of the Supreme Court, Molycorp, Inc. (formerly Molybdenum Corporation of America) (hereinafter "Molycorp") submits this amicus curiae brief supporting the position of respondent and urging affirmance of the judgment below.

[1] The Solicitor General, on behalf of petitioner, and the Special Assistant Attorney General of New Mexico, on behalf of respondent, consented to the filing of this brief by letters dated March 23, 1978 and March 29, 1978, respectively. Copies of said letters have been provided to the Clerk of the Court.

Questions Presented

1. Does the reserved water doctrine guarantee the Government only such water as is essential to ensure fulfillment of the explicit statutory purposes set out in the Organic Administration Act of 1897—preservation of forest timber and maintenance of the forest as a watershed regulator; or does it afford the Government as much water as may be required to satisfy all present and future uses to which the national forests may be put?

2. Whether the Government may invoke the reserved water doctrine against miners on patented lands in national forest reserves who, as directed by federal law, have perfected their water rights in accordance with state law?

Interest of the Amicus Curiae

1. The Questa Mine.

Molycorp is the owner of extensive mining, milling and related properties near Questa in Taos County, New Mexico.[2] These properties consist generally of several hundred patented and unpatented mining claims, patented and unpatented millsite claims and structural facilities for the mining and milling of molybdenum ore.[3] All of these properties are located within the original exterior

[2] These properties are located in Sulphur Gulch, a side canyon of the Red River midway between the towns of Questa and Red River, situated in the Sangre de Cristo mountains of northern New Mexico. (A map of the general area is included at the end of this brief as an appendix.)

[3] Molybdenum is used principally as an alloying agent in steel, iron and nonferrous metals. It imparts to those materials strength, hardness, corrosion resistance and durability at extreme temperatures. In addition, molybdenum is used as a paint pigment, a lubricant and a catalyst.

boundaries of the Carson National Forest. (The Carson National Forest was created by Executive Orders dated November 7, 1906, 34 Stat. 3262, and March 2, 1909, 35 Stat. 2240.)

Molycorp acquired the first of its mining claims near Questa in 1920. Underground molybdenum mining operations began in 1923 and continued until 1956. Between 1957-1964 a major open pit mine and processing mill were developed, commencing operations in late 1965. Current mining operations are continuous; twenty-four hours per day, seven days per week, 365 days per year. Present schedules call for a mining rate of about 35,000 tons of overburden stripped per day. In 1977 the average daily tonnage milled was 16,600 tons. Average annual production of molybdenum from the Questa Mine is about 11 million pounds, or about 7% of the entire molybdenum available on the world market. As a result, Molycorp ranks as the world's sixth largest producer of molybdenum.

Molycorp is easily the largest employer in Taos County (employing 10% of the total work force) and, next to local, state and federal governments, the largest single employer in northern New Mexico. The company currently employs, directly, 400 persons at the Questa Mine; it also engages the services of approximately 75 independent contractors. The annual payroll, including fringe benefits, totals $7.2 million, or approximately 25% of the personal income earned in Taos County. In 1977 Molycorp purchased supplies for the mine in the total sum of $13.3 million, of which amount $5.4 million was spent in the State of New Mexico. The same year the Questa operation paid $1.5 million in local, state and federal taxes.

Since 1964 Molycorp has invested approximately $125 million in its open pit mine and mill facilities. Recently the company spent an additional $15 million toward the

future development and expansion of its mining operations in the Questa area. Current plans call for the investment of several hundred million dollars over the next five-six years to develop and bring into production a major new underground mine.

2. Molycorp's Use of Waters from the Red River Stream System.

Molycorp first received a water permit from the State Engineer of New Mexico in 1922, with a priority date of November 9, 1920. This permit, No. 1432, allowed the company to divert surface water from Red River and Columbine Creek for mining, milling and related purposes. Beginning in the early 1960's, Molycorp also began using the waters of several industrial wells for the same purposes.[4]

The Red River, an eastside tributary of the Rio Grande, rises on the east slope of Wheeler Peak, the highest point in New Mexico. From its headwaters, the Red River flows in a northerly direction through the Village of Red River, then turns and flows in a westerly direction toward the Village of Questa.[5] It thereafter flows in a southwest direction until it empties into the Rio Grande about 5½ miles downstream from the Village of Questa. The drainage area of the Red River Stream System is about 147 square miles, excluding the Cabresto Creek drainage, and over 93 percent is located within the Carson National Forest. The

[4] These waters are taken from the underground Rio Grande water basin, which is hydrologically interrelated with the surface waters of the Red River Stream System, i.e., pumping of underground water from the Rio Grande basin affects the volume of the surface water flowing in the Red River Stream System.

[5] The major tributaries of the Red River include Columbine Creek, entering from the south, and Cabresto Creek, entering from the north.

drainage area of Cabresto Creek is about 46 square miles, and virtually all is located within the Carson National Forest.[6]

The first diversions for irrigation are found at the headwaters of the Red River Stream System, approximately 6 miles above the Village of Red River. Molycorp's diversions are located about 4½ miles downstream from the Village of Red River. Major diversions for irrigation are located east of the Village of Questa.[7] All of these diversion points, specifically including those employed by Molycorp, lie upstream from the lands of the Carson National Forest presently administered by the United States.

Molycorp is currently diverting three cubic feet per second per day from two of its recognized diversion points on Red River. About seven cubic feet per second per day is also obtained from the underground wells, which is the maximum amount that can be drawn from the wells. While Molycorp is currently taking about 10 cubic feet per second of water per day from all of its recognized sources,[8] extant plans for expansion of the existing operation will increase the demand for water to the maximum (19.454 cubic feet per second) currently allowed under Permit No. 1432.

[6] State of New Mexico, Office of the State Engineer, RED RIVER HYDROGRAPHIC SURVEY REPORT 1-2 (1973).

[7] *Id.* at 1.

[8] Converting cubic feet per second of water flow to gallons, Molycorp currently diverts a total of 4,500 gallons per minute; 270,000 gallons per hour; 6,480,000 gallons per day; or 2,365,200,000 gallons per year. (A second foot of water equals 450 gallons per minute.) Stated another way, Molycorp diverts 19.94 acre feet of water per day or about 7,277 acre feet per annum. (An acre foot of water equals 325,000 gallons.) Of the foregoing amount, Molycorp returns 85% to 90% of the water to the hydrological system. Its consumptive use comes to between 900 to 1,000 acre feet per year. In other words, between 292,500,000 and 325,000,000 gallons of water are depleted from the Red River Stream System and Rio Grande underground water basin per year.

The water diverted by Molycorp is used in the mining and milling of molybdenum ore and for a number of related purposes, including laboratory and domestic uses, wetting down of roads, dust control, revegetation and the transportation of waste to the tailings disposal pond located about 9½ miles from the mill. Evaporation of water in the pond and capillary retention of water in the ore results in the depletion of water.[9] The water that is not depleted is decanted from the pond and returned to the Red River Stream System.

3. The Red River Adjudication.

The water rights of Molycorp in and to the Red River Stream System, as well as those of some 500 other defendants, are presently being adjudicated in *New Mexico ex rel. Reynolds* v. *Molycorp Inc.*, Civil No. 9780 (D.N.M., filed November 1972) (hereinafter "Red River Adjudication"), in which case the United States is a plaintiff in intervention.[10] The Government claims a reservation as of 1906 and 1909 of the then unappropriated waters of the Red River Stream System flowing through the lands of the Carson National Forest[11] for the following purposes:

> watershed protection, fire prevention and fire fighting,

[9] The extent of the depletion (i.e., consumptive use) allowed Molycorp under Permit No. 1432 was recently litigated between the company and the State Engineer. *See New Mexico ex rel. Reynolds* v. *Molycorp, Inc.*, No. 1674 (10th Cir. February 3, 1978), which includes a detailed discussion of Molycorp's appropriation and depletion of water.

[10] *See* Brief for United States at 30 n. 15 (hereinafter "U.S. Br. ——").

[11] The Government's complaint in intervention in the Red River Adjudication contains the following allegations:

> II
>
> . . . When these lands [the Carson National Forest] were reserved for national forest use, all unappropriated waters in, on or bordering said lands were withdrawn from private appro-

(footnote continued on following page)

> fish and wildlife propagation and protection, protection and improvement of grazing lands, erosion control, ecosystem protection, recreation, etc. . . .

Memorandum of United States in Support of Objections to Report of Special Master, filed April 25, 1977, in Red River Adjudication, at 19.[12]

The Government's claim to minimum instream flows in the Red River Adjudication is virtually identical to its claim to such flows in this, the Rio Mimbres, case.[13] The

(footnote continued from preceding page)

> priation as against the United States and were reserved for use on such lands by the United States to the extent that such waters are necessary to fulfill the purposes for which the lands were reserved.
>
> III
>
> The United States claims rights to the use of so much of the waters of the Red River and its tributaries on the lands of the Carson National Forest as is or may become necessary to fulfill the purposes of the national forest with priority dates as of the date of withdrawal for national forest purposes of the area of the Forest within which the water is used.

[12] In the Red River Adjudication the Special Master has filed a report rejecting the Government's claim to minimum instream flows for the enumerated purposes. Objections were filed by the United States. Those objections have been briefed (with New Mexico and Molycorp urging acceptance of the Special Master's report) and were argued before District Judge H. Vearle Payne. However, when the New Mexico Supreme Court handed down its decision in the instant case, the District Judge recused himself because his son, Justice H. Vern Payne, authored the opinion of the New Mexico court. As a consequence of this Court's grant of certiorari herein, the Government's objections to the report of the Special Master have been held in abeyance pending the decision to be rendered in the instant case.

[13] The Red River Adjudication also involves an additional claim of the United States to reserved water rights in the Red River under the Wild and Scenic Rivers Act of 1968, 82 Stat. 906, 16 U.S.C. § 1271 *et seq.* The Government claims a reserved right as of 1968 to all unappropriated waters of the lower four miles of the Red River, from below the Town of Questa to the confluence

(footnote continued on following page)

legal issues tendered are identical. Insofar as this Court defines and/or limits the reserved water rights doctrine and articulates the statutory purposes for which unappropriated waters flowing through federal forest reservations may be reserved under the Organic Act (specifically, 16 U.S.C. § 475), the decision herein will be determinative of the very same issues tendered in the Red River Adjudication.

4. Molycorp and All Upstream Appropriators of Western River Waters Flowing through Federal Forest Reservations Have a Vital Interest in the Outcome of this Litigation.

If the Government prevails in this case, and the Court does not exclude from its holding upstream mine-related appropriations which predate the federal assertion of a reserved water right,[14] it will inevitably follow that the rights of the Government in and to the stream flows of the Red River in the Carson National Forest will be accorded earlier priority dates than Molycorp's (to wit, 1906-1909 versus 1920). More importantly, Molycorp as an upstream junior appropriator from the Carson National Forest could be required by the Government to forego water diversions from the Red River and its tributaries unless and until the stream flows past the reserved lands reach the adjudicated rate of flow. Additionally, since the underground waters of the Rio Grande basin and the surface flows of the Red River are hydrologically interrelated (i.e., underground pumping may affect the volume of surface water flows), Molycorp could also be ordered to discontinue pumping from its wells.

Molycorp thus faces the very real prospect that the

(footnote continued from preceding page)

of the Red and Rio Grande Rivers. That claim is not here relevant. It can have no impact on Molycorp as a senior, upstream appropriator and does not add or detract from the Government's claims under the Organic Administration Act of 1897, 30 Stat. 11, as amended, 16 U.S.C. § 473 *et seq.* (hereinafter "Organic Act").

[14] *See infra* at 43-50.

Government could require it to shut down the Questa Mine in order that the Carson National Forest receive sufficient water for, among other things, "fish and wildlife propagation and protection, . . . ecosystem protection, recreation, etc." Since, at certain times during the year, the Red River Stream System does not contain sufficient water to satisfy the needs of Molycorp and fellow upstream appropriators and still deliver the requested minimum instream flows to the Carson National Forest, the very future of the Questa Mine is at stake.

But even more is at risk in this case. The economic well being of Taos County (and perhaps all of northern New Mexico) is tied to the future of Questa Mine. Beyond that perhaps parochial concern is the adverse effect to the nation which must follow the abrupt elimination of seven percent of the world's molybdenum supply from the market place. Since, for example, the steel industry is dependent on molybdenum for the manufacture of its products, the consequences of a reversal herein could well be far reaching.

Looking beyond Molycorp and molybdenum, as we believe the Court should, we point out that Molycorp is only one of the multitude of appropriators of western river waters who divert such waters from points upstream of federal forest reservations. All such appropriators will find themselves displaced in the scheme of priorities if the Government prevails herein, and their water diversions will be imperiled if not, in fact, foreclosed.

In the instant case it is undisputed that there are no points of diversion located upstream on the Rio Mimbres from the Gila National Forest. (A. 109)[15] As such, the

[15] The opportunity for downstream appropriators to transfer their points of diversion upstream is strictly regulated by New Mexico law (*see* N.M. Stat. Ann. §§ 75-5-22, 75-5-23), and there was no evidence offered below as to whether any such transfers were in prospect or even practicable in the instant case.

forest reserve is receiving all of the water that nature has to offer[16] (and is apparently flourishing[17]), so that the Government's legal theories imperil no upstream appropriators.[18] By way of contrast, in the Red River Adjudication there are a good number of appropriators upstream from the Carson National Forest, including municipalities, irrigators and, of course, Molycorp, all of whom will be adversely affected if the Government prevails. Indeed, since more than 60% of the flowing waters in the eleven western states pass through federal reservations,[19] there are undoubtedly innumerable upstream appropriators whose water claims may also be imperiled by a reversal. As such, the Court should recognize that what it says regarding water rights in the Rio Mimbres for Gila National Forest could have a profound impact on the economic and demographic structure of the western United States.

Accordingly, Molycorp submits this amicus curiae brief in order that its vital interest in the outcome of this case (and the similar interests of all water appropriators upstream from federal forest reservations) may be appreciated and considered. Molycorp supports the position of respondent and urges affirmance of the judgment of the Supreme Court of New Mexico.

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[16] While underground pumping downstream from the Gila National Forest might have some impact on the volume of surface water actually flowing through the forest, no proof was offered below to support the proposition that downstream pumping was having any impact on the volume of water nature was delivering to the Gila National Forest.

[17] The one possible exception is the Gila trout; but the fault lies with nature not man.

[18] Indeed, the Special Master granted the Government's request for minimum instream flows only because it made no difference—there were no upstream appropriators who would suffer thereby. (A. 193) The Special Master noted that he might well have rejected the Government's claim had there been such upstream appropriators. (A. 198)

[19] *See infra* at 14.

Summary of Argument

I. The reserved water doctrine has been applied by this Court on only a few occasions, and then, only where the application of the doctrine was essential to accomplish the explicit purposes for which the Government had withdrawn the land involved from the public domain. Consistent with those prior applications, the Court should now specifically hold that the doctrine applies only in those situations where its use is essential to the accomplishment of the explicit purposes of the federal reservation. It should not be construed in such a manner as to provide the Government with an unlimited and undefined right to the waters which flow through the national forests—more than half of the available water supply of the West—in order to satisfy each and every conceivable use to which national forests may ever be put. Extending the reserved water doctrine, as the Government urges, impugns the traditional Fifth Amendment notion that Government taking requires Government compensation. Furthermore, acceptance of the Government's position would place the Forest Service in the unusual position of being able to prefer one user of forest waters over another—hotels over mines, recreation over irrigation—in a shifting, uncontrollable fashion, which would seriously threaten long-established, vested water rights and endanger the economic and demographic structure of the West.

II. The legislative history of the Organic Act reveals that lands could only be withdrawn from the public domain and reserved as national forests for the purposes of timber preservation and watershed maintenance. National forests, unlike national parks, wildlife preserves and other similar federal reservations, were created in full recognition of the fact that they contained valuable natural resources which had to be developed and preserved for the economic well being of the nation. The Organic Act sought

to limit the President's discretion to remove forest lands from the public domain; it did not invest the executive with unchecked discretion to withdraw public lands for the general concern of improving and protecting the forest.

III. Under the Organic Act, the reserved water doctrine is available to the Government in connection with water claims for such things as timber preservation, watershed maintenance, erosion control, fire prevention, and flood control. To the extent that the Government can *prove,* not merely hypothesize, a need to specified quantities of water, including even minimum instream flows, to satisfy such essential purposes, it can claim a reserved right to the use of forest waters. Water necessary to preserve forest wildlife and plantlife, to the extent that fauna and flora can be *proven* to be essential to furthering the purposes for which the national forests were established, would also come under the Government's reservation of water. In this case, however, the Government did not offer any such proof at trial. Accordingly, its claim to reserved water must fail.

IV. Since at least 1866, federal statutes have authorized miners to go upon federal lands to extract the minerals therein. Cognizant of the critical role of water in mining operations, Congress enacted a series of statutes which conferred upon miners the right to use waters found on federal public and reserved lands, and directed miners to perfect their water rights under state law. Consistent with, and in reliance upon, these federal statutory mandates, miners have, for over a century, entered federal lands, staked their claims, received federal patents and perfected their rights to the water necessary to work their mines under state law. In light of this consistent statutory scheme, upon which miners have long relied, the Government may not now invoke the doctrine of reserved water against miners operating patented claims who have perfected their water rights under state law. The Government is estopped from denying its own statutes and patents and rendering worthless years of reliance and billions of dollars of investment capital expended by the nation's miners.

ARGUMENT

I. The reserved water doctrine is a judicial invention borne of necessity, and, as such, it must be carefully tailored to situations where its application is consistent with clear Congressional intent and where the failure to apply it would defeat the purpose of the underlying reservation.

A. Introduction.

The demographic, industrial and agricultural development of the West largely depends upon the availability of water. In 1897, in recognition of the significant role that a uniform water supply would have in the economic development of the West, Congress enacted a statutory scheme for the reservation of national forest lands to protect and preserve western watersheds and thereby ensure a more uniform flow of water through the western waterways.[20]

Now, four score years later, the Government, somewhat ironically, is asserting an undefined and open-ended claim to national forest waters, and by so doing is injecting a degree of instability which seriously threatens the continued use of western waters by others. The reserved rights claimed here "are wild cards that may be played at any time, blank checks that may be filled in for any amount, or that may never be cashed."[21] Private, state

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[20] *See infra* at 32, 36, 37.

[21] F. Trelease, Federal-State Relations in Water Law 160 (National Water Commission Legal Study No. 5, 1971) (hereinafter "Trelease").

and municipal appropriators of water flowing through national forests can never be certain of the continuing availability of water so long as the use to which the Government might apply such water can change—and change dramatically.[22]

The Government now seeks reserved water rights for, among other things, the purposes of improving "'fish and wildlife habitat, fire and erosion protection, aesthetics, recreation, etc.'" (U.S. Br. 23) Rather than quantifying or delimiting the scope of its reserved water rights, the Government extends its claim to include "etc."—an ineffable demand which encompasses all presently conceivable forest uses, as well as those uses which may be conceived of a generation or more from now.

We do not believe it overstates the case to conclude that the Government's present claim of reserved water rights to satisfy every conceivable use of the national forests could have a profound effect on the continuing development of the West. The full impact of the Government's present claim is best appreciated when one considers that the water systems which supply more than 50% of the water to the western states either originate in or flow through the national forests.[23] When the national parks are included in this computation, the percentage rises above 60%.[24]

In view of the significant consequences of the Government's present claim, it is dangerous to assume, as the Government does, that the reserved water doctrine is a Euclidean axiom. This Court has applied the reserved

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[22] *See* Meyers, *The Colorado River*, 19 Stan. L. Rev. 1, 72 (1966).

[23] *See* S. Rep. No. 1407, 86th Cong., 2d Sess. 15 (1960).

[24] Trelease, *supra* at 126.

doctrine in only a few cases,[25] and it has never specifically explored the scope of the doctrine or set forth its parameters. The picture of sylvan serenity which the Government paints does not obviate the need for careful analysis, nor justify the Government's assumption that the doctrine has no boundaries at all.

While the Government frames the issue here as only the proper interpretation of the Organic Act, we submit that the essential question to be resolved concerns the proper construction and application of the reserved water doctrine. It is only after this threshold analysis has been completed that this Court should turn its attention to the Organic Act.

The essence of our submission is that the reserved water doctrine should be construed in a manner that will preserve it for those situations in which its application is essential to the accomplishment of the explicit purpose of the federal reservation involved, but curtail it when the Government seeks to invoke it merely to satisfy the various uses to which the federal reservation at issue may be put, thereby threatening, unnecessarily, to upset significant and long-established vested water rights.

B. *Winters-Cappaert:* The Evolution of the Reserved Water Doctrine.

In 1908, when this Court first enunciated the reserved water rights doctrine in *Winters* v. *United States*, 207 U.S. 564, few persons, including, we submit, the *Winters* Court, would have believed that the doctrine would not only grow to meet the exigencies of future *Winters*-type situations, but would some day serve as the basis for the

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[25] *See Cappaert* v. *United States*, 426 U.S. 128 (1976); *Arizona* v. *California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964); *United States* v. *Powers*, 305 U.S. 527 (1939); *Winters* v. *United States*, 207 U.S. 564 (1908).

Government's claim to much of the waters in the West, including a substantial portion of all of the waters of New Mexico.[26]

In *Winters* the Court was confronted with a situation in which the Indians, who once "had command of the lands and the waters," 207 U.S. at 576, gave up those valuable rights in exchange for a smaller tract of land upon which they would settle and farm. The Indian reservation involved had been established under a treaty of 1888. In settling the Indians on the reservation, the United States hoped to convert them from nomadic hunters to an agricultural people. More than ten years later, however, the defendants, upstream settlers, built dams and reservoirs which diverted the waters from the reservation. Irrigation was necessary if the Indians were to become an agricultural people, and water was necessary for irrigation. Accordingly, this Court concluded that in creating the reservation the "government did reserve [water] . . . and for a use which would necessarily be continued through the years." *Id.* at 577. It was simply incredible "to believe that . . . [the] Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste —took from them the means of continuing their old habits yet did not leave them the power to change to new ones." *Id.*

The judicial invention—the reserved water doctrine—was borne of the necessity of the moment. The implied right was essential to accomplish the express purpose of the treaty involved, namely, the conversion of the Indians from a nomadic to a pastoral way of life. Farming, grazing, stock raising, all would have been impossible had the United States deprived the Indians of the water rights

[26] *See* Trelease, *supra* at 100; *State* v. *Myers*, 64 N.M. 186, 190, 326 P.2d 1075, 1076 (1958).

which they had before they entered into the treaty. To take away the vast tracts of lands which the Indians had once considered their own and to place them on an arid parcel of land without access to water would have even further aggravated an unfortunate chapter in our nation's history. The reserved water doctrine met the necessity and prevented the problem. It did not, however, confer an unlimited and undefined right to the use of water on Indian reservations. Rather than implying a general right, this Court affirmed the lower court decree which had the effect of establishing rights to specified—not unlimited—quantities of water for one specific use: irrigation. 207 U.S. at 565-566.

Thirty years later, in *United States* v. *Powers*, 305 U.S. 527 (1939), this Court reaffirmed the reserved water rights doctrine as it applied to the cultivation of Indian reservation lands. As in *Winters*, however, the Court did not specifically articulate the scope of the doctrine or set forth its parameters.

Arizona v. *California*, 373 U.S. 546 (1963), was the next case to reach this Court in which the reserved water doctrine was involved,[27] though of only incidental importance in that case. After more than a decade of legal controversy over the use of the waters of the Colorado River, the rights of the various states to those waters were finally resolved. The Court's lengthy opinion focused, for the most part, on that controversy. Only in the last pages of the majority opinion did the Court even consider the reserved water doctrine, and, then, it did no more than defer to the findings of the Special Master.

[27] *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), commonly known as the "Pelton Dam" case, although sometimes cited as a reserved water rights case, did not involve the application of the reserved water doctrine. The Court decided only that the Federal Power Act conferred exclusive jurisdiction on the Federal Power Commission to grant licenses for power projects on reserved lands of the United States. The case did not deal with the water rights of either governmental or private users.

Among the findings of the Special Master was his conclusion that when the United States created the Indian reservations involved in that case "it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." 373 U.S. at 596. Irrigation was "essential to the prosperity of these Indians," *id.* at 599, and the reserved water doctrine would serve to supply that essential need.

The reserved right was not unlimited, however, nor did it extend to every conceivable use of water on an Indian reservation. The precise amount of water reserved for irrigation was delineated in the Special Master's Report and adopted in this Court's decree. *Arizona* v. *California*, 376 U.S. 340, 345 (1964). Although reserved water rights were determined with reference not only to the present use of water on the reservations, but also as to the "'reasonably foreseeable needs'" of those reservations, 373 U.S. at 600, significantly, the standard by which those foreseeable needs would be determined—"irrigable acreage", *id.* at 601—was well defined. The future needs of the Indians were largely speculative and thus, the Court concluded, "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.* By embracing a particular standard by which the reserved right could be measured, the Court was able to quantify and define the extent of the Indians' reserved rights. Prospective users of Colorado River waters were thus placed on notice of the existence and extent of the Indians' water rights.

As something of an afterthought, the Court also deferred to the Special Master's conclusion that the United States intended to reserve water necessary "to fulfill the purposes of the Gila National Forest." 376 U.S. at 350. The Court did not consider, much less define, the purposes for which the Gila National Forest had been established, the purposes or uses for which water had been reserved, or the scope,

generally, of the reserved water doctrine as it was applied to non-Indian reservation federal enclaves.[28]

It was not until 1976, in *Cappaert* v. *United States*, 426 U.S. 128, that this Court again confronted the application of the reserved water doctrine.[29] In 1952, pursuant to the authority vested in the President to set aside federal lands of "historic or scientific interest" as national monuments, 16 U.S.C. § 431, President Truman, by executive proclamation, set aside Devil's Hole (in Death Valley) as a National Monument "'for [among other things] the preservation of the unusual features of scenic, scientific, and educational interest therein contained.'" 426 U.S. at 132. As this Court observed in *Cappaert*, additional preambular statements in the Presidential proclamation demonstrated that the monument was being set aside to preserve a unique species of fish which flourished in a pool on the monument grounds. *Id.* Sixteen years after the establishment of the National Monument, the Cappaerts, adjoining landowners, began pumping ground water on their ranch, which had the effect of depleting the water in the National Monument pool to an extent that endangered the species of fish which the monument was expressly designed to preserve.

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[28] As such, we see no merit in the Government's contention that the doctrine of collateral estoppel bars respondent from contesting the United States' claims to minimum instream flows in the Rio Mimbres. (U.S. Br. 17-22) Moreover, none of the actual appropriators of the waters of the Rio Mimbres were parties to the Colorado River water adjudication, and they are not barred from contesting the Government's claims. Since, in this case, New Mexico appears essentially as *parens patriae*, representing the interests of all such appropriators, the doctrine of collateral estoppel is inapplicable. *See, e.g., Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

[29] In two earlier decisions, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976); and *United States* v. *District Court*, 401 U.S. 520 (1971), this Court reaffirmed the existence of the reserved water doctrine, but did not deal with the application of the doctrine. Both decisions involved jurisdictional considerations concerning the amenability of the United States to suit in water rights adjudication proceedings.

Despite this Court's recognition that "the water right reserved by the 1952 Proclamation was thus explicit, not implied," *id.* at 140, the opinion analyzed the case in terms of the implied reservation doctrine. In so doing, the Court emphasized that:

> The implied reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.

Id. at 141. Reasoning that "the pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest," *id.*, the Court concluded that the district court had correctly determined that "the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool and the natural habitat of the species sought to be preserved." *Id.*

The application of the reserved water doctrine in *Cappaert* amounted to little more than a reaffirmation of the Government's explicit rights to the pool in question. Those rights, whether express or implied, were not only consistent with the statutory authorization for, and the executive proclamation establishing, the National Monument, but were essential to the preservation of the species of fish which the monument had been designed to preserve. As in *Winters* and *Arizona*, the rights implied under the doctrine were carefully measured and defined. The application of the doctrine did not afford the United States a right to an unlimited use of water attendant to its reservation of the National Monument lands, but was carefully tailored to ensure the presence of only as much water as was necessary to preserve the particular species involved. Restaurant, lodging and recreational facilities all might be appropriate uses of the Devil's Hole National Monument, but the reserved water rights recognized in *Cappaert* were limited to meet only the particular necessity specifically identified when the land was reserved, to wit, the needs of the "pup fish". The right did not extend to all peripheral uses of the National Monument. It fulfilled the express purpose of the reservation and "no more." 426 U.S. at 141.

The common theme in these cases is the invocation of the reserved water doctrine in situations where the failure to find a reserved water right would have undermined the essential purpose of the federal reservation. In each case the reservation of water was tailored to meet a specific, perceived necessity; it was not held that the doctrine extended to each and every use to which the federal reservation might be put.

C. The Scope and Application of the Reserved Water Doctrine—Essential Necessity as a Limiting Factor.

There is no reason why the implied water rights of the federal government cannot coexist with state-created rights of private, state and municipal users. The reserved water doctrine should be construed so as to avoid the complete and irresponsible usurpation of all state-granted water rights by the fiction of implied federal rights. While state-granted rights cannot impair the Government's exercise of its implied rights where called for by the exigencies of the situation, the federal rights should not be so expansive, so undefined, as to swallow whole all state-created rights.

As the Government concedes in its brief, "federal statutes . . . [have] deferred to state law to govern the private use of water found on public lands. . . . Under this statutory authority, private appropriators have long been permitted to remove water from national forests for private purposes, including substantial uses such as those involved in mining and irrigation." (U.S. Br. 29-30)[30] In

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[30] *See* Organic Act, 16 U.S.C. § 481; Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. § 321; Act of July 9, 1870,

(footnote continued on following page)

the area of mining, for instance, "Congress chose to give federal approval to rights recognized under this system of state and local law—which was uniquely suited to the needs of the mining community—rather than to establish a federal law of water rights."[31] As explained more fully in the Government's brief in *Andrus* v. *Charlestone Stone Products Co., Inc.*, the effect of these statutes was to require mines and other claimants to water to perfect their rights under state law. Government patents would convey fee interests in the lands or minerals therein, but they would not convey any rights to appurtenant waters.[32]

(footnote continued from preceding page)

16 Stat. 218, as amended, 30 U.S.C. § 52; Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. § 51, also codified at 43 U.S.C. § 661. Section 706(a) of the Federal Land Policy and Management Act of 1976, Pub L. 94-579, 90 Stat. 2743, 2793 (hereinafter "Land Act of 1976"), repealed portions of the Act of July 26, 1866, but left undisturbed the provision of that Act that defers to state law to govern the use of water on the public lands and the lands in the national forest system. *See* 30 U.S.C. § 51 and 43 U.S.C. § 661, as amended.

[31] Brief for Petitioner, Cecil D. Andrus, Secretary of the Interior, *Andrus* v. *Charlestone Stone Products Co., Inc.*, Sup. Ct. Docket No. 77-380, at 17 (hereinafter "*Charlestone* Br.").

[32] This Court has, on at least three occasions, considered this statutory scheme. *See Cappaert* v. *United States, supra; Federal Power Commission* v. *Oregon (Pelton Dam), supra;* and *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935). In *Pelton Dam* and in *Cappaert* it was suggested that these statutes only effected a severance of the waters on public lands and not on reserved lands. In light of Congress' 1976 reaffirmation of the application of this scheme to national forest lands (*see* note 30, *supra*), and the essential purpose of these statutes as emphasized by the Government in its *Charlestone* brief, we believe that *Pelton Dam* and *Cappaert* must be read as holding as follows: *First*, as to public lands, these statutes effected a severance of the waters from the lands, and all water rights, including those of the federal government, have to be perfected under state law. *Second*, as to reserved lands, the water rights of private, municipal and state users are to be determined under state law, but the federal government's reserved rights are

(footnote continued on following page)

In *Charlestone* the Government argues that the decision of the court of appeals in that case[33] "would cast doubt on rights long thought to be established under state and local law and would unsettle the law of water rights in the Western States." (*Charlestone* Br. 31) We agree, but find the Government's position there to be irreconcilable with its position in this case. Here the Government argues that private water rights, which have evolved over the last 100 years, should be subjected to an undefined, reserved water right of the United States. (U.S. Br. 30) Although the Government does not address the consequences of its assertion, it follows from the Government's claim for reserved water for the present and *future* needs (U.S. Br. 17) of the federal forests for "'aesthetics, recreation, etc.'" (U.S. Br. 23), that the very same rights which the Government seeks to preserve in *Charlestone* will be seriously undermined if its position here is accepted.

As we demonstrate in the next section of this brief (*see* p. 40, *infra*), the Government seeks to support its construction of the Organic Act via an analytic approach that confuses the purposes for which lands in the public domain could be set apart and reserved for national forests with the uses to which the forests would thereafter be put. To

(footnote continued from preceding page)

not subject to state law and enjoy priorities from the dates of reservation. Neither *Pelton Dam* nor *Cappaert* can be read as extending the Government's reserved water right to all *uses* which may be made of reserved lands. Rather, we submit, a logical reading of these cases suggests that water for the Government's various *uses* of reserved lands (whether directly or through licensees or permittees) must be perfected under state law and are subject to prior state-perfected rights, but *water essential to fulfill the explicit purpose of the reservation* enjoys special protection under the Supremacy Clause of the Constitution and the reserved water doctrine. Any other result would endanger water rights that have been perfected under state law in accordance with the federal statutory scheme. *See infra* at 43-50.

[33] 533 F.2d 1209 (9th Cir.), *cert. granted*, 46 U.S.L.W. 3357 (No. 77-380, November 28, 1977).

accept the assertion that this dichotomy is meaningless is to conclude that the reserved water doctrine is limited only by the ingenuity of the administrators of federal reserved lands, and that is no limitation at all. The Government's novel interpretation of the Organic Act does not justify the expansion of this judicial invention in such a way as to defeat rights which, for the past 100 years, have been perfected under state law, particularly since the federal statutory scheme has deferred historically to state law for the establishment of such rights.[34]

If, as the Gevornment suggests (U.S. Br. 37), eminent domain is the only other way in which water can be obtained to satisfy every conceivable use of a national forest,[35] that is entirely consistent with the constitutional limitations of the Fifth Amendment. As this Court observed in *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502 (1945):

> The Fifth Amendment, which requires just compensation where private property is taken for public uses, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project.

See also, Federal Power Commission v. *Niagara Mohawk Power Corporation*, 347 U.S. 239 (1954). The reserved water doctrine should be appropriately limited by traditional Fifth Amendment considerations and should defer to existing vested rights so long as those rights are not inconsistent with the particular necessity to which the federal reservation is addressed. "The reservation doctrine is a financial doctrine and nothing more."[36] As such, it should

[34] *See* note 30, *supra*.

[35] Needless to say, the Government has always had the option of perfecting water rights under state law and has often done just that. *See* A. 106-108.

[36] Trelease, *supra* at 147m.

be construed in a manner most consistent with the letter and spirit of the Fifth Amendment.

While the Government relies upon the existence of vested water rights to justify expansion of the reserved water doctrine to defeat such rights and acquire the appurtenant water without compensation (U.S. Br. 30), it offers no reason why such an expansion of the doctrine at the expense of traditional Fifth Amendment notions is warranted. Indeed, the very existence of state-sanctioned, vested water rights created with the blessing of Federal Law is the strongest argument in favor of limiting the reserved water doctrine and requiring the Government to compensate those whose property may be rendered valueless if their water is taken.

An inevitable consequence of the expansion of the reserved water doctrine will be the preference of some water users over others. Western waters are already fully appropriated.[37] Thus, if the Government is entitled to reserved water for every national forest use that a Forest Service administrator may deem appropriate, the water to satisfy such bureaucratically sanctioned, new uses must come from some current user. There is no reason why the Government should be allowed to prefer a new water use (e.g., water for a resort hotel) over a water use which has been perfected for 60 years[38] (e.g., water for mining and milling).[39] Nor, for that matter, is there any reason why

[37] *See* Trelease, *supra* at 33.

[38] The likelihood that this example could, in fact, occur, is suggested by the Government itself. (U.S. Br. 50) *See also* Trelease, *supra* at 122.

[39] Economically, such a reallocation of rights is counterproductive. In New Mexico, for example, virtually all surface waters are fully appropriated and the creation of a new use must be at the expense of, or through the purchase of, water rights of an existing user. A misallocation of resources occurs to the extent that the party who loses water rights is not compensated, since the party who gains the rights is paying less than the true cost of undertaking the activity. This encourages the less than optimum use of water by the party gaining the right—in this case the Government. Trelease, *supra* at 153-154.

a hotel within the borders of a national forest should be preferred over a hotel located downstream from the forest.

Here, for instance, the Government argues that it is entitled to reserved water rights for recreational purposes. (U.S. Br. 23) Yet, the national forests were designed to foster the economic development of the West; they were not reserved as recreational sites to the exclusion of their use by timber and mining interests.[40] True, the forests could be used for recreational purposes, but mining was expressly contemplated as a national forest use, and the Organic Act incorporated specific provisions regarding the use of national forests by miners. 16 U.S.C. §§ 477, 478, 481, 482. The Government now prefers recreational uses to mining ones. The hiker, the fisherman and the sportsman, all enjoy the use of our national forests, and all presently coexist with the miners and other economic users of the forests. But recreation does not stop there. Recreation encompasses ski resorts, hotels, man-made lakes, "etc.". By invoking the reserved doctrine in this fashion, the Government can subjugate one use to another, notwithstanding that the subjugated user may have perfected its rights under state law.

Nothing less than a direct Congressional command, and then only one consistent with traditional constitutional requirements, should serve as the basis for the application of the reserved water doctrine. While it is true, as this Court observed in *Cappaert,* that Congressional "[i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created," 426 U.S. at 139, those purposes must be interpreted in a manner which is not only consonant with the statutory scheme creating the reservation, but essential to that scheme. To permit anything less than a showing of

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[40] *See infra* at 33-34.

essential necessity to fulfill the explicit purpose of the reservation would allow the Government to exercise carte blanche—without any rhyme or reason it could prefer one use over another.

II. The Organic Act, by defining the purposes for which lands may be withdrawn from the public domain and set aside as forest reservations, limits the reserved water rights of the Government on forest lands to such waters as are essential for the preservation of forest timber and the maintenance of the forest as a watershed regulator.

A. The Statutory Text.

Our analysis of the Organic Act begins with the relevant language of the statute itself.

> No national forest shall be established, except to improve and protect the forest within the boundaries, **or** for the purpose of securing favorable conditions of water flows, **and** to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . .

16 U.S.C. § 475 [emphasis supplied].

The Government maintains that the Organic Act empowered the Executive to reserve public lands for national forests if the reservation served any one of three purposes: to improve and protect the forest; **or** to secure favorable conditions of water flows; **or** to furnish a continuous supply of timber. (U.S. Br. 12) The text of the Act, however, does not support such a reading. One can reach that conclusion only if one ignores the placement of commas in the statute and disregards the alternate use of conjunctive and disjunctive connectors. In a word, the Government reads "**and**" as if it were "**or**".

The statute, as actually written, provides that a national forest can be created if one of two dual purposes are served: either

1) "to improve and protect the forest," **and** "to furnish a continuous supply of timber";

or

2) "for the purpose of securing favorable conditions of water flows," **and** "to furnish a continuous supply of timber".

By its literal terms the statute requires timber supply as a necessary element of any forest reservation.

While our reading, as opposed to the Government's, is faithful to the words used and the grammatic structure of the sentence Congress wrote, we recognize that the law as written conflicts with the common Congressional understanding of the 1890's that national forests should be reserved for the important purpose of preserving western watersheds (*see* U.S. Br. 39), even where the trees were of no value as timber.

There can be no dispute that watershed management was perhaps the most important objective of the Organic Act. Congress intended that forest reservations be established at the headwaters of the various rivers in the West because the forest cover would reduce the severity of spring floods and thereby ensure a more uniform supply of water to western users. The trees on reservations in the high peaks of the Rockies were of no value as timber, however, due to their remote location and sparse growth. The creation of these forests reserves, while critical to an effective program of watershed management, would not serve "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." As one Congressman explained in the floor debate immediately preceding passage of the Organic Act:

> The reservations that have been established in my state and in most of the Rocky Mountain States are in high altitudes from 8,000-11,000 feet above the level of the sea. They were selected in high altitudes because there only will shade prevent the melting of snow until mid-summer, when water is needed for irrigation. Everyone understands that large trees cannot grow in high altitudes, and hence it is absurd to contend that these lands even if they were accessible would be taken up for the value of timber that is upon them.

30 Cong. Rec. 983-84 (1897) (Rep. Shafroth).

It is, therefore, clear that the words of the statute as written are an inadequate guide to Congressional intent. Since it is undisputed that Congress did not intend by passage of the Organic Act to preclude the establishment of forest reserves having no timber producing potential, but which were critical to the demands of watershed maintenance, we must turn our attention to the legislative history of the Act in order to learn what Congress actually intended when it enacted 16 U.S.C. § 475.

B. The Legislative History.

As opposed to the confusion inherent in the statutory text, the legislative history materials reflect a consistent understanding from the time the original version of the Organic Act was introduced in 1892[41] until its passage five years later. The Government is less than candid in suggesting that the legislative history of that statute is unclear. (U.S. Br. 51) Petitioner's brief ignores Congressional sources and relies instead on an assortment of administrative manuals regarding the uses of national forests, which the Government invites this Court to weigh as if they were interpretations of the Organic Act itself. (U.S. Br. 44-49) By focusing, instead, on the legislative history materials it becomes clear that the Congressional purpose was unambiguous. What Congress intended was to limit the purposes for which lands could be withdrawn from the public domain and set apart as federal forest

[41] S. 3235, 52d Cong., 1st Sess., 23 Cong. Rec. 4887 (1892).

reservations to just two: namely, preservation of forest timber and the maintenance of the forest as a watershed regulator.

By Section 24 of the Act of March 3, 1891 (hereinafter "Creative Act"),[42] the President was empowered to set aside lands "wholly or in part covered with timber or undergrowth, whether of commercial value or not" as forest reservations. The Creative Act set no limits on the power of the President to establish forest reservations, and did not provide for the administration and use of these reserves.[43]

Beginning in 1892, a series of bills were introduced to remedy the deficiencies of the Creative Act. The proposed legislation defined the authority of the President to withdraw lands from the public domain as forest reserves and established a regulatory scheme to govern the use of the national forests. The proposals did not

> increase the [President's] authority over the forests, but on the contrary, further restrict[ed] it by declaring the purposes for which reservations may be made.

25 Cong. Rec. 2374 (1893) (Rep. McRae).

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[42] 26 Stat. 1095, 1103, as amended, 16 U.S.C. (1970 ed.) § 471, repealed by Section 704(a) of the Land Act of 1976, 90 Stat. 2792.

[43] While the objects of the Creative Act were not explained in the statute itself, it was understood that these objects were

> first and foremost of economic importance, not only for the present but more specifically for the future prosperity of the people residing near such reservations, namely, first, to assure a continuous forest cover of the soil on mountain slopes and crests for the purpose of preserving or equalizing waterflow in the streams which are to serve for purposes of irrigation, and to prevent formation of torrents and soil washing; second, to assure a continuous supply of wood material from the timbered areas by cutting judiciously and with a view to reproduction.

REPORT OF THE CHIEF OF THE DIVISON OF FORESTRY, H.R. Ex. Doc. No. 1, Part 6 (Report of the Secretary of Agriculture), 52d Cong., 1st Sess. 224 (1892).

Although the various bills reflect minor differences in the language regarding the purposes for which lands could be withdrawn from the public domain and set apart as national forests,[44] the statement's of the legislation's supporters reflect a clear, continuing and unchanging understanding of the intent of the proposals. In 1892, for instance, the

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[44] For example, Rep. McRae, the leading proponent of the legislation in the House, introduced a version which would have provided:

> That the objects for which public forest reservations shall be established under the provisions of the act approved March 3, 1891, shall be *to protect and improve the forests for the purpose of* securing a continuous supply of timber for the people and securing conditions favorable to water flow.

H.R. 119, 54th Cong., 1st Sess., 28 Cong. Rec. 6410 (1896) [emphasis supplied.] The failure of Congress to adopt this version does not indicate that the phrase "improve and protect", as used in the act as passed, should be accorded broad and independent meaning. The legislative history does not reveal why this version was rejected in favor of the one ultimately enacted. Indeed, Rep. McRae himself had previously sponsored a version similar to the enacted statute which provided:

> That no public forest reservations shall be established except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people.

H.R. 119, 53d Cong., 1st Sess., 25 Cong. Rec. 2371 (1893). When asked about the purposes for which national forests could be created under this bill, Rep. McRae stated that:

> The bill authorizes the President to establish forest reservations, and to protect the forests 'for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people.'

25 Cong. Rec. 2375 (1893). He attributed no broad and independent significance to the phrase "improve and protect the forest." Rather, his statement suggests that the language of the Organic Act has no different meaning than his 1896 version.

Senate Report explaining an early Senate version of the Act, S. 3235, emphasized:

> That the object of the public forest reservations is twofold, namely, to maintain desirable forest conditions with regard to water flow, and, at the same time, to furnish material to the communities in their neighborhood.

S. Rep. No. 1002, 52d Cong., 1st Sess. 10 (1892). The report further emphasized that the proposals were not designed to foster conservation for conservation's sake alone.

> Since these forest reservations are not to be in the nature of parks, they are to remain open to public use and entrance for all purposes, excepting so far as restrictions appear necessary in order to protect the property from damage and depredation. Prospecting and mining are to be permitted under proper regulations.

Id. at 12.

This theme continued in 1893. The Report interpreting the House version of the legislation explained:

> These reservations are not, to be sure, in the nature of parks set aside for nonuse, except to satisfy pleasure and curiosity. They are established solely for economic reasons.
>
> It becomes, therefore, necessary, also, to prescribe the manner and methods by which the timber growing thereon, the mineral contained therein, the water powers furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which these reservations have been made, namely, to secure such forest conditions as are necessary to preserve an even water flow.

H.R. Rep. No. 2437, 52d Cong., 2d Sess. 2 (1893). This same litany was recited by Congressman McRae. *See* 25

Cong. Rec. 2375 (1893). In his view the proposed legislation was not intended to preserve forests to the exclusion of the economic development of the West. It was, in fact, an economic development act:

> I would not consent to have 17 million acres of public domain dedicated as a park upon which our citizens could not go, upon which no miner could prospect, and no herdsmen [*sic*] could carry his flock. No, I want the forest utilized for all legitimate purposes not inconsistent with the promotion of the growth of the timber cover. Let prospectors, miners, farmers, herdsmen, and all American citizens, under proper restrictions, enter and labor, do their mining, cutting that timber which is authorized to be cut, and no other.

25 Cong. Rec. 2433 (1893).

The Government ignores the existence of other statutory schemes under which the Executive could reserve lands to preserve sites of recreational, historic or scientific interest.[45] Such was not the purpose of the Organic Act. As Congressman McRae stated:

> We are not dealing with parks, but forest reservations, and there is a vast difference.

25 Cong. Rec. 2375 (1893).

The Act, as a measure to preserve the forests for the economic development of the West, gained further support in 1894. The bill as originally reported from the House Committee "was exceedingly objectionable to all the Repre-

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[45] *See, e.g.*, Act for the Preservation of American Antiquities, 34 Stat. 225, 16 U.S.C. § 431 *et seq.*; National Trails System Act of 1968, 82 Stat. 919, 16 U.S.C. § 1241, *et seq.*; Wild and Scenic Rivers Act of 1968, 82 Stat. 906, 16 U.S.C. § 1271 *et seq.* In addition, Title 16 of the United States Code includes innumerable special acts of Congress creating national parks and recreation areas.

sentatives from the West," 27 Cong. Rec. 110 (Rep. Hermann), among other things because it "denied the mining of the mineral land—prospecting and development of the mineral resources of the country—which may be contained in the forest reservations or in any of the timber lands outside of them." *Id.* These objections were met by amendments which permitted miners to enter upon the reserved lands subject to safeguards prescribed by the Secretary of the Interior. The amendments also empowered the President to withdraw from forest reserves those lands which were more valuable for their mineral content. *Id.* at 110-11. These important accommodations to the mining interests of the West did not alter the central purpose of the legislation. The bill still served two principal objectives:

> the protection of the forests against destruction by fire or by ax and the preservation of such forests upon which water conditions and water flow are said to be dependent.

Id. at 111.

At the next session of Congress, the House Committee on Public Lands issued a report which essentially mimed past statements regarding the purposes for which forest reserves could be created. *See* H.R. Rep. No. 1593, 54th Cong., 1st Sess. 3 (1896). Significantly, the Report also emphasized that forest

> reservations are not in the nature of parks set aside for non-use, but they are established solely for economic reasons.

Id.[46] Although the Government suggests that the national forests were established with a view towards recreation

[46] A substantially identical statement appeared in an earlier House Report. *See* H.R. Rep. No. 2437, 52d Cong., 1st Sess. 2 (1893).

and wildlife preservation at the expense of the economic development of the West (U.S. Br. 46-50), the legislative history of the Organic Act, which the Government's brief ignores, squarely rebuts this suggestion.

The Organic Act came within a short distance of adoption in prior sessions of the Congress,[47] but the final impetus for enactment came on February 22, 1897, with President Cleveland's reservation, by executive proclamation, of over 21 millon acres of new national forests.[48] This executive action more than doubled the acreage of the national forests. As a consequence, all persons, including those settlers and miners already on these lands, were precluded from using the forests for any purpose. Indeed, under the executive proclamation the cutting of timber was a crime. Accordingly, these new reservations aroused the hostility of many western senators and representatives.[49] Some perhaps overstated the case in characterizing the President's action as "the most barbarous outrage that has been perpetrated in the last half century." 30 Cong. Rec. 1281 (Sen. Stewart). The Senator from Utah was more precise in his criticism:

> [W]e are having withdrawn by Executive order all the desirable portions of the State not already settled. There is no opportunity there for further enlargement of civilization by the establishment of agriculture or mining.

[47] Versions of the Organic Act passed both the House and the Senate in the third session of the 53d Congress (1894-1895), but the conference report was blocked on the floor of the House and the bill failed in one of the last days of the session. 27 Cong. Rec. 3248 (1895). The bill passed the House in the first session of the 54th Congress, 28 Cong. Rec. 6411 (1896), but no action was taken in the Senate.

[48] J. Ise, The United States Forest Policy 129 (1920).

[49] Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat. Resources Law. 503, 504 (1974); Ise, *supra* at 129.

30 Cong. Rec. 1281 (Sen. Cannon).[50]

President Cleveland's order stimulated Congressional action. The Organic Act—legislation which restricted the President's free hand and specified the purposes for which national forests could be created—was finally adopted on June 4, 1897. The President was no longer empowered to "set apart and reserve . . . public land bearing forests . . . whether of commercial value or not . . . as public reservations."[51] Now, public lands could be withdrawn for national forests only if the precise objectives of the Organic Act were met. While the text of the Act is ambiguous as to those purposes, the legislative history is not:

> Mr. Smith (Arizona): What is the purpose of the reservation?
>
> Mr. McRae: To conserve the water flows, and to furnish a continuous supply of timber for the people.

30 Cong. Rec. 967 (1897).[52]

Furnishing "a continuous supply of timber for the people," is self-explanatory. Congress was concerned that the unregulated cutting of trees in our nation's forests would lead to a situation where there was no timber left for use

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[50] Other senators and representatives expressed similar statements of hostility. *See, e.g.*, 30 Cong. Rec. 901, 1284 (Sen. Pettigrew); 30 Cong. Rec. 902 (Sen. Carter); 30 Cong. Rec. 909-910 (Sen. Wilson); 30 Cong. Rec. 969 (Rep. Knowles).

[51] Creative Act.

[52] The Congressional Record of the 55th Congress, first session, is replete with similar statements of the bill's objective. *See, e.g.*, 30 Cong. Rec. 966 (Rep. McRae) ("protection of the forest growth against destruction by fire and ax, and preservation of forest conditions upon which water conditions and water flow are dependent"); 30 Cong. Rec. 986 (Rep. Bell) ("these reservations are not forest reservations for the sake of the forests. They are reservations to promote the water supply to the farms in the valleys below."); 30 Cong. Rec. 987 (Rep. Jones of Washington) ("conserve our timber supply" and protection against floods); 30 Cong. Rec. 1007 (Rep. Ellis) ("preserve . . . the water supply.")

in connection with the future development of the nation. "Conserve the water flows" has an equally specific meaning: ensuring a uniform supply of water to be used in the economic development of the largely arid western lands.

> [F]orests exert a most important regulating influence upon the flow of rivers, reducing floods and increasing the water supply in the low stages. The importance of their conservation on the mountainous watersheds which collect the scanty supply for the arid regions of North America can hardly be overstated. With the natural regimen of the streams replaced by destructive floods in the spring, and by dry beds in the months when the irrigating flow is most needed, the irrigation of wide areas now proposed will be impossible, and regions now supporting prosperous communities will become depopulated.

S. Doc. No. 105, 55th Cong., 1st Sess. 10 (1897). Conserving the water supply was not intended to encompass minimum instream flows for the improvement of fish and wildlife habitat, fire prevention, " 'aesthetics, recreation, etc.' " (U.S. Br. 23) Congress did not intend, by the phrase "favorable conditions of water flows," to mandate a system of water rights under which the Government would be entitled to the riparian rights of "natural" (U.S. Br. 30) stream flows in derogation of the western system of prior appropriation. It intended rather to maximize the water available for beneficial economic use by maintaining the western watersheds.

The Government contends that the "improve and protect" language of the Organic Act, standing alone, constitutes a purpose the accomplishment of which, without more, may serve as a basis for executive action removing land from the public domain for national forests. (U.S. Br. 27) The legislative history of the Act does not support that contention. Nothing in the legislative history materials indicates that Congress intended to attribute independent meaning to the "improve and

protect" words of the statute. *See* note 44, *supra*. In our view the phrase is simply precatory, and was used for the purpose of ameliorating the concerns of those who feared that even under the proposed legislation the timber interests would "steal it all and leave nothing but a naked wilderness." 27 Cong. Rec. 111 (Rep. Wells) (1894). As recently explained by the Fourth Circuit,

> [f]rom its initial settlement and continuing throughout the greater part of the nineteenth century, the nation's forest lands were wastefully exploited. . . . By the late nineteenth century responsible leaders, both in and out of Government, had become so alarmed that they warned the Congress and the country against the immediate and long range effects on both water flow and timber supply which would inevitably result if the irresponsible and profligate timber practices were permitted to continue.
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> • • •
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> This legislative history demonstrates that the primary concern of Congress in passing the Organic Act was the preservation of the national forests.

West Virginia Div. of Izaak Walton League v. *Butz*, 522 F.2d 945, 950, 952 (4th Cir. 1975). Thus, the phrase "improve and protect" speaks to the general concern that the forests be preserved; a concern that involved the subject of forest management rather than forest creation. The language complimented and reinforced the provisions of the Organic Act which specifically dealt with the power of the Executive Branch to control forest use. *See* 30 Stat. 35, as amended, 16 U.S.C. (1970 ed.) § 476, repealed by Section 13 of the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2958.

At any rate, whatever meaning is to be ascribed to the "improve and protect" language must be consistent with the overall legislative history of the Organic Act. Recalling that Congress was outraged that under the Creative Act President Cleveland could withdraw public lands from further use in the economic development of the West (*supra* at 35-36), it is beyond contention that the Organic Act was designed to limit the President's unbridled discretion and to preserve the forests for economic development. As such, "improve and protect" cannot mean that the President was suddenly invested with the same broad discretion which the Congress sought to restrain. The language cannot serve as a basis for conserving the forest waterways for conservation's sake alone at the expense of the private, municipal, and state users of water.

Consistent with the legislative history of the Act, "improve and protect" might serve to modify the specific purposes for which national forests could be reserved from the public lands. Fire protection, flood control, erosion protection, all would seem consonant with and, perhaps, even necessary adjuncts of, timber preservation and securing favorable conditions of water flows. While it is conceivable that "improve and protect" may have been designed to modify and insure a flexible interpretation of the explicit purposes for which forests could be reserved, it is inconceivable that this language could serve as an independent, essentially undefined and unrestrained basis upon which the President could withdraw lands from the public domain.[53]

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[53] An analysis of the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 *et seq.*, confirms that Congress understood that the purposes for the establishment of a national forest under the Organic Act were limited to watershed management and timber preservation. The statute states that its outdoor recreation, fish and wildlife purposes are "supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in Section 475 of this Title." This language would be superfluous if, as the Government argues here, a national forest could have been set up under the Organic Act for fish, wildlife or recreation purposes. The legislative history of the 1960 Act likewise supports the conclusion that Congress understood that the purposes for which a national forest could be created under the Organic Act were limited to watershed management and timber conservation. *See, e.g.*, 106 Cong. Rec. 11697 (1960) (Rep. Colmer); 106 Cong. Rec. 11706 (1960) (Rep. Van Zandt); 106 Cong. Rec. 11717 (1960) (Rep. Miller).

Finally, the Government seeks to bloster its interpretation of the Congressional intention underlying the Organic Act by confusing the purposes for which the President can withdraw public lands with the uses to which those lands subsequently can be put. (U.S. Br. 44-53) We agree that the use-purpose distinction is not significant in the administration of the national forests. However, as the legislative history of the Organic Act demonstrates (*see supra* at 32-35), the distinction is vital when dealing with the subject of forest creation. Furthermore, the Government never explains why the reserved water doctrine should be expanded to encompass every conceivable forest use sanctioned by the Forest Service.[54] We find no support for that position in the cases applying the reserved water doctrine. Rather, we submit that the case law demonstrates that reserved water rights must be founded on a clear statement of Congressional intent. Here the legislative history of the Organic Act limits that intent to timber preservation and watershed maintenance. The case law and legislative history rule out reserved water rights for every use which an ingenious forest administrator may conjure up.

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[54] The absurdity of the Government's argument is underscored by the many and diverse uses made of forest lands. In the early part of the century permits were issued for the following forest uses:

> Agricultural, apiaries, cabins, dipping vats, gravel, hay cutting, hotels and road houses, lime kilns, pastures, railroads, residences, resorts, saw mills, slaughterhouses, stage stations, stores, tramways (aerial), telegraph lines, telephone lines.

U.S. Department of Agriculture, Forest Service, THE NATIONAL FOREST MANUAL, SPECIAL USES 7 (1908).

Permission by the Forest Service to carry on activities such as slaughterhouses or dipping vats cannot mean that the national forests were created to serve these purposes, and that such activities carry with them rights to reserved water.

III. The Government must prove that the reserved water rights it seeks are essential for the preservation of the forest as a timber resource and watershed regulator.

Contrary to the impression sought to be conveyed by the Government (U.S. Br. 30), the issue is not verdant forests versus arid deserts. The Government may, in an appropriate case, establish that it is entitled to reserved water for national forest purposes by proving that the water sought is essential to fulfill the forest's role as the regulator of the watersheds and as the supplier of timber. In this case petitioner has made no such showing. Beyond that, the Government never even suggested at the trial of this case that the flora and fauna in the Gila National Forest were not getting sufficient water, and its brief does not refer the Court to any scientific authority which supports that proposition.

The Government now claims that minimum instream flows are necessary for erosion control, fire prevention, watershed protection, maintenance of "natural" flows downstream, wildlife habitat protection, preservation of fish, stockwatering, aesthetics and etc. (U.S. Br. 22-23, 57) To begin with, the Government made no attempt at trial to relate any of these water uses to the statutory purposes of timber preservation and watershed maintenance. The only *proof* which the Government offered at trial was that minimum instream flows were necessary to preserve a particular species of fish. (A. 88-89) Unlike the "pup fish" in *Cappaert,* the Government did not show, or even attempt to show, that the preservation of Gila trout was one of the statutory purposes for which the federal reservation was created.

Whether water is actually needed to fulfill the purposes of the federal reservation, in this case watershed management and timber preservation, is always a question of fact.

If, for example the Government *proves* that certain minimum instream flows are necessary to keep timber-producing trees from dying, or that erosion of the soil will result in spring floods unless certain water levels are maintained, then it will have made a *prima facie* case supporting a claim for reserved water. Conceivably, the Government might be able to establish that animal watering facilities are essential to the survival of wildlife which consumes destructive insects infesting the timber. Water for this purpose would also satisfy the statutory test.

Rather than relying upon record evidence supporting the need for minimum instream flows, the Government offers the Court only the hypothetical concern that if upstream appropriators remove a substantial amount of water from the Rio Mimbres "the instream flow in the forest below can be reduced to the point of injuring the land and life of the forest." (U.S. Br. 30) No such injury could possibly occur to the forest bordering the Mimbres because there are no upstream appropriators. (A. 109)[55] As a practical matter, therefore, the Government is already receiving all of the water it will ever receive from the Mimbres; nothing that this Court could do would turn the Gila National Forest into, or keep the forest from becoming, a barren wasteland.

There is little likelihood, moreover, that wildlife or plantlife will be deprived of water in other national forests. Virtually all of the streams in the Rocky Mountains are fully appropriated,[56] yet the streams continue to flow through the national forests. That the forests continue to

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[55] While downstream appropriators could apply to transfer their points of diversion to locations upstream from the forest, such transfers are not automatic under New Mexico law. The applicant must receive approval of the State Engineer's office and cannot impair the rights of downstream users. N.M. Stat. Ann. §§ 75-5-22, 75-5-23. *See supra* note 15.

[56] *See* Trelease, *supra* at 33.

flourish bears testimony to the effective, and century-old scheme of private appropriation through state regulation. This Court should be loathe to jettison that salutary system.

IV. The Government may not invoke the doctrine of reserved water rights incident to federal forest reservations against miners on patented lands who have perfected their water rights under state law and have developed their claims in reliance on their patents and water permits.

A. Introduction.

Though not directly at issue in the case at bar, we are concerned that a decision in favor of petitioner, no matter how narrowly framed, will be seized upon by the Government for use against all water appropriators, including miners, located upstream from federal forest reservations. We submit that a decision protecting the rate of water flow the Government seeks in the Rio Mimbres should not control in a case in which the Government asserts a similar claim against an upstream mine, operating on patented lands, which has perfected its water rights under state law, has used those waters for nearly 60 years, and has invested substantial sums in reliance on its federal patent and state water permit. Accordingly, we respectfully urge that if the Court reverses the judgment below, it indicate in its opinion either that the reserved water rights of the United States incident to federal forest reservations cannot be used to interfere with water rights perfected in accordance with state law by mining operations, or, alternatively, that the subject of the relative water rights of the United States vis-a-vis miners remains open.

B. Federal Law Encourages the Use of National Forest Reservations for Mining and Provides that State Law Shall Govern the Water Rights of Miners.

Although Section 9 of the Act of February 27, 1865, 13 Stat. 440, implied a license for miners to go upon federal lands and extract minerals within the forest, the Act of July 26, 1866, 14 Stat. 251, as amended, 30 U.S.C. § 22 *et seq.*, specifically declared, for the first time, that the mineral lands in the public domain were "free and open to exploration and occupation."[57] The Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. § 22 *et seq.*, was the first comprehensive federal mining code. The basic policy of the 1866 Act of "free and open mining" was continued; the 1872 Act provided that all valuable mineral deposits in the lands owned by the United States were open to entry and development.[58] The Act further set forth, with considerable specificity, the manner of locating claims, the procedure for obtaining patents to claims, and the rules relating to assessment and discovery work required to validate claims.

The Organic Act, which authorizes the withdrawal of forest lands from the public domain, provides that such withdrawals do not foreclose access to forest reserves by miners. *See* 30 Stat. 34-36, 16 U.S.C. §§ 477, 478, 481, 482.

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[57] The 1866 statute authorized the location and patent of lode or vein claims. In 1870 placer claims were also made subject to location and patent. Act of July 9, 1870, 16 Stat. 217, as amended, 30 U.S.C. § 35.

[58] By the Mining and Minerals Policy Act of 1970, 84 Stat. 1876, 30 U.S.C. § 21(a), Congress further defined national policy on mineral development, stating that "it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs . . . ."

The Organic Act specifically provides that nothing in the statute is intended to prohibit any person from entering the forests for the purpose of "prospecting, locating and developing the mineral resources thereof." 16 U.S.C. § 478. It further provides that the mineral lands in forest reserves were to remain subject to entry under the existing federal mining laws. 16 U.S.C. § 482.[59] As recognized by the Forest Service in 1974 in regulations issued concerning the use of surface lands of the national forest system by persons operating under the mining laws,

> prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the Act of June 4, 1897 [the Organic Act], to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production. Exercise of that right may not be unreasonably restricted.

39 Fed. Reg. 31317.

Having opened the public domain and later the national forests to miners, Congress, "recogniz[ing] the critical role of water in mining operations" (*Charlestone* Br. 14), enacted a series of statutes pertaining to the miners' use of water. Rather than adopt a federal code, Congress chose instead "to ratify the rights recognized under the state and local laws that had been developed in the arid regions to allocate water among competing uses, including mining." *Id.* *See also id.* at 19. Thus the federal mining laws have always "provided separately for the right to mine valuable minerals and for the acquisition of water rights." *Id.* at 14.

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[59] *See also* Act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959; Act of February 1, 1905, 33 Stat. 628, as amended, 16 U.S.C. § 524; and Sections 501 and 701 of the Land Act of 1976, 90 Stat. 2776, 2786, which provide for the grant of rights-of-way across national forest lands for conduits used to carry water to mine and mill sites.

In Section 9 of the 1866 Act Congress declared that

> Whenever, by priority of possession, rights to the use of water for mining . . . have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . .

14 Stat. 253, as amended, 30 U.S.C. § 51, also codified at 43 U.S.C. § 661. The same approach was followed in Section 17 of the Act of 1870, which provided that "[a]ll patents granted . . . shall be subject to any vested and accrued water rights . . . as may have been acquired under or recognized by" Section 9 of the 1866 Act. 16 Stat. 218, as amended, 30 U.S.C. § 52. The Act of 1872 did not disturb the water rights provisions of the earlier statutes. *See* §§ 9 and 10 of the Act of May 10, 1872, 17 Stat. 94.

As the Government explains in its *Charlestone* brief, the decisions of this Court make it clear that those statutes express "Congress' intention to allow state and local laws to govern the acquisition of water rights on the public domain, for purposes including but not limited to mining." (*Charlestone* Br. 16) *See Atchison* v. *Peterson,* 87 U.S. (20 Wall.) 507 (1874); *Basey* v. *Gallagher,* 87 U.S. (20 Wall.) 670 (1874); *Jennison* v. *Kirk,* 98 U.S. 453 (1878); *Broder* v. *Water Co.,* 101 U.S. 274 (1879); *Sturr* v. *Beck,* 133 U.S. 541 (1890); *San Jose Land & Water Co.* v. *San Jose Ranch Co.,* 189 U.S. 177 (1903); *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142 (1935). *See also Hunter* v. *United States,* 388 F.2d 148 (9th Cir. 1967). Thus, federal law has always governed the grant of land patents, but state and local law has always governed the acquisition of water rights.

Various other public land statutes "followed the pattern established in the general mining laws, recognizing that state law governs the acquisition of private water rights

on public lands." (*Charlestone* Br. 20) *See, e.g.,* the Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. § 321;[60] and the Taylor Grazing Act of 1934, 48 Stat. 1270, as amended, 43 U.S.C. §315b.[61] Most significant for our purposes is that portion of the Organic Act, 16 U.S.C. § 481, which provides:

> All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.

Though Congress repealed parts of 30 U.S.C. § 51 and 43 U.S.C. § 661 by Section 706(a) of the Land Act of 1976, 90 Stat. 2793, it continued the system of state law control of water rights (*see* Sections 701 and 706(a), 90 Stat. 2786, 2793), and, as previously noted (*supra* note 30), specifically preserved 16 U.S.C. § 481 and the rule that state law governs the use of water on national forest lands.

C. The Government May Not Invoke its Reserved Water Rights Against Miners Operating Patented Claims Who Have Perfected their Water Rights Under State Law.

As a consequence of the foregoing statutory scheme, as construed by the decisions of this Court, miners have en-

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[60] "[A]nd all surplus water over and above such actual appropriation and use [for irrigation], together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing right."

[61] "[N]othing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law."

tered upon the public lands of the United States, including national forests, and have invested countless dollars to develop their claims and bring forth the mineral resources located therein. In so doing, pursuant to the mandate of federal law, they have secured the water necessary for their operations in accordance with the provisions of state law. Ignoring that statutory scheme, and with total disdain for the vested interests at stake, the very same sovereign which granted the miners their patents and told them that their water rights would be protected by state law, now contends that it may deprive them of the water necessary for their survival. To add injury to insult, the Government even eschews traditional concepts of fair compensation for property rights destroyed and invokes the judicial invention of senior water rights implied from the reservation of the forest lands.

Acceptance of the Government's position "would cast doubt on rights long thought to be established under state and local law and would unsettle the law of water rights in the Western States." (*Charlestone* Br. 31. *See also id.* at 13.) Of more immediate concern to this *amicus* is the impact such a ruling would have on its established mining interests totalling $140 million in capital investment.

Examine for a moment the potential plight of Molycorp (or any other similarly situated mining operation). In 1920, long before the concept of reserved water rights was applied to federal forest reservations, the company began to develop the Questa Mine. Today, some 58 years later, it has invested $125 million in developing the open pit mine. Another $15 million has recently been spent to prepare for the expansion of existing operations. Molycorp holds federal patents to claims covering thousands of acres of land that were originally part of the Carson National Forest. In order to mine those claims, and then mill the resulting ore, Molycorp is dependent upon the availability of

significant quantities of water. As required by federal law, Molycorp perfected its claims to the waters of the Red River, Columbine Creek and the underground Rio Grande basin pursuant to state law, receiving its first permit in 1922. Yet, notwithstanding these vested interests and the company's reasonable reliance on the provisions of federal and state law concerning water rights, the Government now contends that, even without compensating Molycorp, it has the power to deprive the Questa Mine of the water it has been using for nearly 60 years.

We submit that, even if the Court agrees with the Government that under the Organic Act it is entitled to reserved water rights for all uses to which the national forests can be put, in view of the federal statutory scheme outlined above, the Court should hold that the reserved water doctrine may not be invoked by the Government as against miners operating on patented lands in national forest reserves who have perfected state water claims and were actually using the waters at issue for mining, milling and related purposes before the assertion of the federal reserved water rights.

Our conclusion is supported by our analysis of the reserved water doctrine (*supra* at 15-27)[62] and by principles of equitable estoppel.

While we recognize that a claim of equitable estoppel ordinarily does not lie against the sovereign, *United*

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[62] We do not read *Federal Power Commission* v. *Oregon (Pelton Dam)*, *supra*, nor *Cappaert* v. *United States*, *supra*, as holding to the contrary. To begin with, the former does not involve a Government claim to reserved water rights. *See supra* note 32. Moreover, neither case involved a contest between the reserved water rights of the federal government and the state water rights of miners holding federal patents. This Court did not have occasion to consider the impact of the federal mining statutes and patent system on such contests.

States v. *Utah Power & Light Co.*, 243 U.S. 289 (1917),[63] the circumstances here present fully support the application of that doctrine to the Government's assertion of reserved water rights against miners such as Molycorp. *See United States* v. *Wharton*, 514 F.2d 406 (9th Cir. 1975); *United States* v. *Lazy F.C. Ranch*, 481 F.2d 985 (9th Cir. 1973); *United States* v. *Georgia Pacific Co.*, 421 F.2d 92 (9th Cir. 1970).

The predicament of Molycorp, and all similarly situated miners, raises factual issues similar to those involved in *United States* v. *Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941), wherein the court held:

> Here the acts of the Secretaries of the Interior were in strict conformity with the will of Congress as expressed in two separate Acts of Congress. Relying upon the Acts of Congress, and the grants issued to it under such Acts by the administrative officer designated in the Act to make such grants, defendant expended something in excess of $250,000. Clearly the plaintiff is estopped to question the validity of these grants.

Id. at 474. *Accord, Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894, 902 (D. Colo. 1977).

By raising, at this late date, the doctrine of reserved water rights, the Government effectively seeks to deny its own statutes and patents and to render worthless years of reliance and billions of dollars of investment capital expended by the nation's miners. We have, therefore "a clear case for the application of equitable estoppel against the government." *Id.*

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[63] Molycorp does not premise its claim of estoppel on either the active misconduct or silence of governmental officials as was the case in *Utah Power & Light Co.* In contrast to defendant's colorable claim to public lands in that case, here Molycorp received federal patents pursuant to federal statutes authorizing its entry on national forest reserves and providing for the patenting of mining claims. *See* Section 6 of the Act of May 10, 1872, 17 Stat. 92, as amended, 30 U.S.C. § 29.

Conclusion

For the reasons advanced in Parts I, II and III, *supra*, and for the reasons advanced by respondent, the judgment of the Supreme Court of New Mexico should be affirmed. Alternatively, if the Court reverses the decision below, for the reasons advanced in Part IV, *supra*, the Court should hold that the Government may not invoke its reserved water rights against miners operating patented claims in federal forest reserves who have perfected their water rights under state law and who were actually using the waters at issue prior to the federal assertion of reserved water rights.

April 3, 1978.

Respectfully submitted,

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APPENDIX

DRAINAGE AREA OF RED RIVER AND CABRESTO CREEK

SCALE: 1 inch = 3 miles